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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM BOYD, Defendant and Appellant.	C058203 (Super. Ct. No. 05F03243)

A jury convicted defendant William Boyd on 24 counts of sexual offenses against his daughter, including two counts of aggravated sexual assault on a child under age 14 (Pen. Code, § 269, subd. (a)).[1] The trial court sentenced him to 14 years plus a consecutive 30 years to life in prison. On appeal, defendant claims that he received ineffective assistance of counsel because his attorney failed to (1) adequately communicate with him, (2) advise him to accept the plea offer, (3) prepare him to testify, or (4) personally interview the victim. We shall affirm.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

Defendant and his wife had two children together. One daughter was given up for adoption, and the other daughter, N.B., was born in 1990.

Defendant was an extremely angry individual with a habit of yelling at N.B. and his wife on a daily basis. His remarks to N.B. were frequently rude and demeaning. On a monthly basis, defendant would become sufficiently angry to throw things around the house. He once threw the family cat through a closed window when it awakened him. He also once kicked the dog.

Defendant twice pointed a knife at his wife's throat during disputes.

Defendant began molesting N.B. when she was in second grade. Defendant would make her sit on his lap to look at child pornography on the computer while both of them were naked. He also made her take off her clothes and lie on top of him. He would make her play with his penis, or he would put his mouth on her vagina.

On two or three occasions, defendant tried to force her to orally copulate him. She resisted. Once defendant tried to penetrate her vagina with his penis. When N.B. told him to stop because it hurt, he responded that he would "save that for when [she was] older."

At various times, defendant ejaculated on N.B.'s leg, clothing, and bedding. Sometimes defendant would say he was sorry, only to molest her again the next day.

While his wife was working outside the home, defendant sexually molested N.B. every other day. Defendant molested her less frequently only after she was in sixth grade.

Defendant sexually molested N.B. twice while she was in eighth grade. She decided to tell someone about the molestations when it appeared that her mother was going back to work. Because the molestations had been "really bad" while her mother had previously worked outside the home, N.B. was afraid defendant would molest her more frequently and aggressively when her mother resumed employment.

In January 2005, N.B. told her best friend that defendant had molested her. Her friend convinced N.B. that she needed to tell someone, and the two of them went to see the school counselor. N.B. told the school counselor about the sexual molestations. After reporting the abuse, N.B. was examined by a pediatric nurse. During the examination, N.B. described the history of defendant sexually abusing her. N.B. again recounted the details to a child abuse detective with the Sacramento County Sheriff's Department.

When N.B. told her mother about the sexual molestations, her mother expressed disbelief. This greatly upset N.B. Eventually, N.B. was removed from her parents' custody, and placed in a foster home. To facilitate visits with her mother, N.B. was transported to the St. Francis Home for Children. During visits, N.B. and her mother repeatedly violated the restriction forbidding them from discussing defendant or the

pending criminal case against him. Her mother said that both of them would end up homeless if N.B. testified about being sexually molested. Her mother also lamented that she would probably lose her job by having to go to court. N.B. told Ellen Dunn, the social worker who supervised the visits, that her mother instructed N.B. to deny the sexual molestations.

On February 22, 2005, N.B. excitedly relayed to Dunn that her mother finally believed N.B. had been molested. About a week later, N.B. told Dunn that her mother promised they could get an apartment together if N.B. changed her story. Her mother warned that both parents would go to jail if N.B. did not recant. The next day, N.B. left a voice mail message for Dunn indicating that N.B. planned to say she had fabricated all of the accusations.

Within a week, defense counsel informed the child abuse detective that N.B. had recanted.

At trial, N.B. denied that defendant had ever sexually molested her or shown her pornography. She did admit telling her best friend, the school counselor, the pediatric nurse, and police detective that defendant had sexually molested her. Each of these individuals testified at trial about N.B.'s earlier accounts of being sexually molested by defendant.

PROCEDURAL HISTORY

In June 2005, the Sacramento County District Attorney filed an amended complaint charging defendant with one count of continuous sexual abuse of a child (§ 288.5, subd. (a)); 21

counts of lewd and lascivious acts with a child under age 14 (§ 288, subd. (a)); one count of aggravated sexual assault (rape) of a child (§ 269, subd. (a)(1)); and one count of aggravated sexual assault (oral copulation) of a child (§ 269, subd. (a)(4)). The trial court deemed the complaint an information, and defendant entered a plea of not guilty on all counts.

Before jury selection, the trial court asked the prosecutor whether an offer for a negotiated plea had been communicated to defense counsel. The following colloquy occurred:

"THE COURT: All right. [¶] You each have 20 peremptory challenges because this is a life case. [¶] The offer in the case, the People's offer was?

"[Prosecutor]: Low term, three years.

"THE COURT: To one count?

"[Prosecutor]: To one count of child molest.

"THE COURT: 288(a)?

"[Prosecutor]: Correct.

"THE COURT: That offer was relayed to the defendant?

"[Defense Counsel]: Yes, sir.

"THE COURT: And he has rejected that offer. [¶] Is that correct, Mr. Boyd?

"THE DEFENDANT: Yes, it is, Your Honor.

"[Prosecutor]: For the record that is purely based on the victim recanting."

Upon defendant's rejection of the offer, the case proceeded to trial. A jury convicted defendant on all 24 counts.

The trial court granted defendant's request for appointment of a new attorney to represent him in filing a motion for new trial based on ineffective assistance of counsel. Newly appointed counsel filed the motion, which the trial court denied.

On June 8, 2007, the trial court sentenced defendant to a prison term of 14 years plus 30 years to life. The sentence comprised 12 years (the middle term) for continuous sexual assault of the child and 2 years (one third of the middle term) for one count of lewd and lascivious acts on the child; a consecutive 30 years to life for the two aggravated sexual assaults; and 2 years (one third the middle term) for each of the remaining 20 counts of lewd and lascivious acts on the child for a total of 40 years to run concurrently.

On February 22, 2008, defendant filed a motion for relief from untimely filing the notice of appeal. On February 28, 2008, this court granted the motion, and defendant filed a notice of appeal within the time granted.

DISCUSSION

Defendant contends that the trial court erred in denying his motion for new trial based on ineffective assistance of his attorney. Defendant asserts that his counsel failed to adequately communicate with him, advise him on the plea offer,

prepare him to testify, or to personally meet with N.B. We are not persuaded.

A motion for new trial constitutes a permissible method for a defendant to present a claim of ineffective assistance of counsel even though the new trial statute (§ 1181) does not include deficient representation among the enumerated grounds for a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) When a defendant establishes constitutionally deficient legal representation, a trial court must grant the motion. (*Id.* at pp. 582-583.)

We accord great weight to the trial court's decision regarding allegations of incompetence by trial counsel, especially when the defendant was represented by an attorney who was appointed specifically to raise the issue. (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.) "It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them." (*People v. Fosselman, supra*, 33 Cal.3d at p. 582.)

The test for assessing whether defense counsel provided ineffective assistance of counsel is well established. "To demonstrate that a defendant has received constitutionally inadequate representation by counsel, he or she must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance

subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937 (*Alvernaz*); see generally *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674].)

Our review must begin with the presumption that defense counsel provided proper advice and competent representation. "In assessing the adequacy of counsel's performance, a court must indulge 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."'" (*People v. McDermott* (2002) 28 Cal.4th 946, 988, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 689.)

With these principles in mind, we turn to defendant's claims that he received constitutionally deficient legal representation.

A. Failure to Communicate

Defendant asserts that "[c]ounsel failed to properly consult with, communicate with, and/or advise [him] in this matter." Specifically, defendant alleges that defense counsel refused to sufficiently visit or communicate with him in jail.

That a defendant finds communication with defense counsel unsatisfactory does not by itself establish ineffective assistance of counsel. "'[T]he number of times one sees his

attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence.'" (*People v. Hart* (1999) 20 Cal.4th 546, 604, quoting *People v. Silva* (1988) 45 Cal.3d 604, 622.) The Sixth Amendment does not require counsel to communicate enough to satisfy the defendant, but only to communicate sufficiently to allow for effective representation. (*People v. Hart*, *supra*, at p. 604.) Thus, there is no requirement of regular visits with a defendant once counsel has completed preparation for trial. (*Ibid.*)

Here, the record indicates that defense counsel provided far more than the constitutionally required minimum for communication. In a declaration submitted by the prosecution in opposition to the motion for new trial, defense counsel explained, "When I first got this case, [defendant] was out of custody. I remember meeting with him and his wife at my office. I don't remember how many times we met, but I do remember one really long meeting I had with him and his wife at my office. . . . I believe that we may have had one other meeting at my office, but I can't remember if it was with [defendant] or just his wife. Over the course of this case, I met several times with [defendant] *and would stay and meet with him as long as he desired*. Once [defendant] was incarcerated . . . I would meet with him in jail. . . . Our meetings were lengthier in the beginning, as I was collecting information from him and explaining the process, but as the case progressed I didn't need to meet with [defendant] for as long. I would update him on the

investigation or offer from the prosecution and answer his questions." (Italics added.) In addition to meeting as long as defendant wanted, Defense counsel also reviewed the immense amount of material that defendant and his wife provided.

Contrary to defendant's assertions of deficient communication while he was in jail, defense counsel stated that he "would stay at the jail and speak to [defendant] for as long as he wanted to talk. . . . I had continual contact with him throughout the trial. *I never refused a request from* [*defendant*] *to talk about his case during trial*." (Italics added.) The trial court had more than sufficient basis to conclude that defendant received adequate legal representation.

Even if defendant were able to show little communication occurred with his attorney, we nonetheless affirm because defendant has pointed to no deficiency in the defense resulting from any lack of communication. To secure a reversal, however, defendant must establish that the lack of communication caused the defense to be wrongfully incomplete. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *People v. Earp* (1999) 20 Cal.4th 826, 870-871.)

Defendant's argument fails to demonstrate constitutionally inadequate communication or prejudice.

B. Failure to Advise

Defendant next contends that trial counsel failed to adequately advise him to accept the prosecution's pretrial offer of a stipulated three-year sentence for admission of a single

count of nonforcible lewd and lascivious act on a minor. "It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*Alvernaz, supra,* 2 Cal.4th 924, 934.)

In addition to showing that the advice was constitutionally deficient, a defendant must establish prejudice arising out of the deficiency. "To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain *and* that in turn it would have been approved by the trial court." (*Alvernaz*, *supra*, 2 Cal.4th at p. 937, italics added.) Here, defendant fails to establish either of the required showings of prejudice.

On appeal, defendant does not contend that he would have accepted the plea offer but for the deficiency of counsel. Although the record indicates that defendant briefly considered accepting the plea offer, it does not show that defendant would have accepted the plea offer if he had been advised differently. In place of the required showing, defendant points to the testimony of an expert he called during the hearing on the motion for new trial. The expert testified that he "believed defense counsel should have done everything to convince [defendant] to plead guilty." An expert opinion, however, cannot substitute for objective evidence establishing that

defendant would have accepted the plea offer if not thwarted from doing so by defense counsel. (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

Defendant's silence on his intent to accept the plea offer is consistent with the observations of the trial court and prosecutor that defendant was adamant about going to trial. Defense counsel likewise explained, "When I met with [defendant] we would discuss updates on the investigation, trial dates, plea offers, etc. [Defendant] was in general not interested in negotiations. He wanted his trial and he wanted it quickly. As we got close to trial there was a time when he asked about the offer. He was asking if I thought he should take it. It sounded like he was considering taking it. He told me something to the effect of 'I'm not saying that nothing happened, but [N.B.] isn't telling the whole truth.' After that short period of consideration, he decided that he wanted a trial. Then he was in a hurry to get the trial done; he wanted to get it over with."

In addition to failing to demonstrate his intent to accept the plea offer, defendant fails to establish that the trial court would have approved the plea agreement. Defendant disclaims that "there is any sense in the record that the court would have disapproved the People's offer . . . ." Defendant, however, must affirmatively show that the trial court would have approved the three-year stipulated sentence. "In addition to proving that he or she would have accepted the plea bargain, a

defendant also must establish the probability that it would have been approved by the trial court. Such a requirement is indispensable to a showing of prejudice because '"[j]udicial approval is an essential condition precedent to any plea bargain"' negotiated by the prosecution and the defense (*People v. Stringham* (1988) 206 Cal.App.3d 184, 194), and a plea bargain is ineffective unless and until it is approved by the court. (*Ibid.*; see *People v. Orin* (1975) 13 Cal.3d 937, 942-943; [] §§ 1192.1, 1192.2, 1192.4, 1192.5.)" (*Alvernaz*, *supra*, 2 Cal.4th at pp. 940-941.)

Here, defendant received a plea offer of the low term for admission of a single count of nonforcible lewd and lascivious touching of a child under age 14. (§ 288, subd. (a).) The offer of a stipulated three-year sentence stood in stark contrast to the penalties that could be imposed for the crimes with which he was charged. Conviction of any one of the 24 counts alleged in the information allowed for a longer sentence than that called for in the plea offer. (See § 288, subd. (a) [providing for the upper term of eight-years in prison for nonforcible lewd and lascivious touching of a child].) The allegations of aggravated sexual offenses each carried a potential life sentence. (§§ 269, subd. (a)(1) & (a)(4) [aggravated sexual assault of child by rape or oral copulation].) And, the allegation of continuous sexual abuse of a child carried a potential 16-year prison term. (§ 288.5, subd. (a).)

As the record shows, the sole reason for the prosecution's offer was the fact that N.B. had recanted. Despite the recantation, multiple witnesses were available to testify about N.B.'s earlier allegation that defendant sexually molested her. The trial court would have been well within its discretion to reject a three-year stipulated sentence because "the practical benefits of plea bargaining should never outweigh the public's interest in the vigorous prosecution of the accused, the imposition of appropriate punishment, and the protection of victims of crimes." (*People v. Cardoza* (1984) 161 Cal.App.3d 40, 43.) In any event, we cannot presume that the trial court would have approved the prosecution's offer. (*Alvarez*, *supra*, 2 Cal.4th at pp. 940-941.)

Defendant has failed to demonstrate that defense counsel prevented him from accepting the offer or that the trial court would have approved a three-year negotiated plea bargain.

C. Failure to Prepare Defendant to Testify

Defendant did not testify at trial.

Defendant argues that defense counsel failed to adequately prepare him to testify. A defendant has a fundamental right to testify even if counsel believes it to be against defendant's interest. (*People v. Nakahara* (2003) 30 Cal.4th 705, 717.) Failure to adequately prepare an insistent defendant to testify constitutes ineffective assistance of counsel. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1031-1032.)

As we have already noted, a defendant must establish prejudice to succeed on a claim of ineffective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *People v. Earp*, *supra*, 20 Cal.4th at pp. 870-871.) Thus, defendant must demonstrate that he would have testified if not prevented by defense counsel's dereliction of duty.

Defendant makes no attempt to establish that defense counsel prevented him from testifying. He again deflects attention from the lack of showing as to his own intent by relying on the testimony of a witness at the hearing on the motion for new trial. The opinion of defendant's witness that defense counsel should have prepared defendant does not establish that he actually intended to testify.

In denying the new trial motion, the trial court found that defendant never intended to testify. The court stated: "[Defendant] mentioned he wanted to testify. He wasn't allowed to or wasn't forcefully pushed enough to testify or take an offer. [¶] I think this is all Monday morning quarter-backing. *There is no showing he would have testified to it anyway.* I think it was a good decision not to put him on the stand. [¶] . . . [¶] [T]here is no showing as to what he would have testified to anyway if he had taken the stand. [¶] I just feel that [defense counsel] has done an effective job of counsel, and I can't say he's fallen below the standard by any means."

The trial court had sufficient basis to reach this conclusion because defense counsel had declared that defendant

never planned to testify. Defense counsel recounted: "All along, we were in agreement that he should not testify." Moreover, defense counsel explained, "I always told him that it was absolutely his choice whether or not to testify. The decision not to testify was his. He never made an indication to me that he had changed his mind and wanted to testify so that it was not something we formally prepared for. If [defendant] had decided that he wanted to testify we would've had time during the off-days/weekends of the trial to prepare him. . . . [Defendant] never came to me and said that he wanted to testify but couldn't because he didn't feel prepared."

Defense counsel also set forth several strategic considerations supporting the collective decision not to have defendant testify: "First, the prosecution had a pretext phone call in which he never admitted molesting [the victim]. His demeanor on the tape was not what I would have hoped, but it was still a denial. If that tape was [*sic*] played, that would allow him to get in a denial without being subject to cross examination. We talked about maybe changing our position if the tape was [*sic*] not used, but I was certain the D.A. would play the tape. Second, my observations of [defendant] during the preliminary hearing and during our meetings led me to believe that he could be a hot head. I saw that he had a hard time controlling his emotions. I did not want that to become visible to the jury. [Defendant] had lots of buttons that would have been easy for the D.A. to push. . . . Also, he made it clear

that as a father he was not comfortable with getting on the stand and speaking ill of, or 'bad-mouthing', his daughter."

In sum, defendant never planned to testify and defense counsel articulated several reasonable strategic considerations counseling against the testimony. Lacking a demonstration of deficient assistance of counsel or prejudice, we reject defendant's argument.

D. Failure to Meet with N.B.

Finally, defendant alleges ineffective assistance of counsel due to defense counsel's failure to personally meet with N.B. To succeed on this claim, defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (*Id.* at p. 690.)

Defense counsel admitted that he did not personally meet with N.B. Even so, he articulated several rational tactical reasons for the omission. Defense counsel explained, "I did not interview [N.B.] I did not feel that I should for several reasons. I knew that I already had a statement from her, a

statement recanting the allegation, under oath. . . . I had obtained information about [N.B.] from various sources; I spoke to her parents, I had a transcript of the 300 W&I proceedings, I had the information from CPS regarding the family history, I had the preliminary hearing transcripts (at which I saw her testify), investigation statements from my investigator, and all of the statements from law enforcement. From all these reports, as well as casual conversations I had with prosecuting attorney and [N.B.'s mother], I felt like I knew what [N.B.] was going to say. More importantly, I felt it could be dangerous to interview her in light of her recant. I knew that there were issues being raised in which it was claimed that [N.B.]'s supervised visits with her mother were not being properly supervised. I knew that there were allegations that her mother was getting to her and telling her to recant. I was of the belief that by interviewing [N.B.] I had little to gain but lots to lose and was worried that could open the door for the prosecution to claim that the defense team was coaching [N.B.], or somehow putting pressure on [N.B.] to stay with her recant. I did not want to give the prosecution the opportunity to bring that before the jury. I thought the best strategy was just leave [N.B.] alone given the fact she was already on our side."

Defense counsel's reasons informing his decision not to personally meet with N.B. were rational tactical considerations. The trial court did not err in concluding that defense counsel

provided effective, albeit unsuccessful, representation of defendant.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

BUTZ, J.